

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SIR LEE SHOALS,

Plaintiff,

v.

HOME DEPOT, INC., et al.,

Defendants.

1:05-cv-01185 OWW SMS

ORDER DENYING DEFENDANT'S
MOTION FOR PARTIAL JUDGMENT ON
THE PLEADINGS, GRANTING
DEFENDANT'S MOTION TO STRIKE
PLAINTIFF'S PRAYER FOR
ATTORNEY'S FEES (DOC. 18), AND
DENYING PLAINTIFF'S MOTION FOR
TRIAL BY JURY (DOC. 16).

I. INTRODUCTION

This lawsuit concerns an oral home improvement contract allegedly entered into by Plaintiff Sir Lee Schoals and Daniel Rule,¹ a former employee of Defendant Home Depot, Inc. ("Defendant" or "Home Depot"). Before the court for decision are (1) Defendant's motion for partial judgment on the pleadings, in which Home Depot seeks dismissal of Plaintiff's contract claim and requests that Plaintiff's prayer for attorney's fees be stricken (Doc. 18); and (2) Plaintiff's motion for trial by jury (Doc. 16).

¹ Mr. Rule is not named as a defendant in this lawsuit.

1 **II. BACKGROUND**²

2 Plaintiff, who has been blind since 1986, must exercise on a
3 regular basis for health reasons. (Compl. at ¶8.) In January
4 2004, Plaintiff became interested in constructing an addition to
5 his home for use as a home gym. (*Id.*) Plaintiff has little
6 knowledge of the building industry, so he contacted the city of
7 Corcoran, California, where he resides, to seek advice as to the
8 approximate cost of such an addition. (*Id.* at ¶9.) He was
9 advised by the City that the project would cost approximately
10 \$20,000. (*Id.*) Plaintiff secured a loan for that amount. (*Id.*)
11 Plaintiff then contacted several builders, and learned that this
12 cost estimate was very low. (*Id.* at ¶10.)

13 Soon thereafter, Plaintiff heard a television advertisement
14 by Home Depot indicating that Home Depot "did home improvements."
15 (*Id.*) Plaintiff called Home Depot and spoke to a young woman,
16 who referred him to another Home Depot employee, Daniel Rule, who
17 worked in the "Pros Department." (*Id.* at 11.) Rule advised
18 Plaintiff that Rule would have to inspect the construction site
19 before he could determine whether Home Depot could perform the
20 work for him. (*Id.* at 11.)

21 In early May 2004, Rule met with Plaintiff. Rule introduced
22 himself as the department manager for Home Depot's Pros
23 Department. (*Id.* at 12.) Rule advised Plaintiff that the
24 project could be completed for \$20,000 and that, as a licensed
25

26 ² This background section is based on the facts as
27 alleged in the complaint, which must be assumed true for purposes
28 of this motion. *Hal Roach Studios, Inc. v. Richard Feiner and*
Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990).

1 electrical contractor,³ Rule could do the electrical work for
2 Plaintiff at no charge. (*Id.*) Rule further advised Plaintiff
3 that he would open a Home Depot charge card in Plaintiffs name to
4 facilitate the purchase of materials from Home Depot. (*Id.*)

5 On May 7, 2004, Rule prepared a computer assisted design
6 drawing (CAD) of a floor plan for the addition using a Home Depot
7 computer and software. As planned, the addition was to include a
8 spa room. In May 2004, Plaintiff paid Rule approximately \$4,600
9 for a spa, but never received it.⁴ (*Id.* at ¶13.)

10 At some point, Plaintiff inquired whether there would be a
11 contract for the work that was to be performed. Rule responded
12 that the CAD plans were the contract. (*Id.* at ¶14.)

13 In June 2004, Rule brought two other persons to the job
14 site. Rule represented that they were licensed contractors,
15 although apparently they were not. These individuals provided
16 Plaintiff with estimates for certain aspects of the work.
17 Plaintiff responded that he could not pay the amount requested
18 because of the sums he already paid to Rule. Rule then advised
19 Plaintiff that Home Depot had a "special financing program for
20 persons with disabilities" and that Rule would arrange for Home
21 Depot to increase Plaintiff's credit limit. (*Id.* at 15.)
22 Plaintiff's credit limit was subsequently increased from \$750 to
23 \$5,600.

24 During May and June 2004, Plaintiff requested reimbursement
25

26 ³ Rule apparently had no contractors license at all.

27 ⁴ Plaintiff alleges that the spa was later sold to
28 another Home Depot employee for the remaining balance on the spa
of approximately \$200. (*Id.* at 13.)

1 for approximately \$5000 of expenses. Plaintiff complied with
2 this request. Plaintiff also paid the two other "contractors"
3 more than \$5000. (*Id.* at 17.)

4 In June 2004, Plaintiff became suspicious of Rule and called
5 the Corcoran planning office to inquire about permits for the
6 addition. Plaintiff was informed that there were no permits on
7 file. Plaintiff then demanded that all work on the project
8 cease. (*Id.* at ¶17.)

9 Plaintiff alleges that Rule engaged in this type of conduct
10 in the past and that Home Depot was aware of his previous
11 activities, but did nothing to prevent him from continuing to do
12 so. (*Id.* at ¶18.)

13 Plaintiff initially filed this lawsuit in the Superior Court
14 for the County of Kings on August 25, 2005. (See Doc. 16-2.)
15 The complaint contains three causes of action for (1) promissory
16 fraud; (2) negligent misrepresentation; and (3) breach of
17 contract. Among other prayers for relief, Plaintiff seeks
18 attorneys fees and punitive damages.

19 On September 16, 2005, Defendant removed the case to this
20 court on the basis of diversity. (Docs. 1 & 2.) On October 14,
21 2005, counsel for both parties met and conferred pursuant to
22 Federal Rule of Civil Procedure 26(f). At this meeting, counsel
23 for plaintiff informed counsel for defendant that Plaintiff
24 desired a jury trial. Defendant asserted that a jury trial was
25 not available because Plaintiff had not timely demanded one.
26 These positions are reflected in the joint scheduling report
27 filed on December 1, 2005, which provides:
28

Shoals contends that he is entitled to a jury. Home Depot contends that Shoals is not entitled to a jury because Shoals did not make a timely demand for one.

(Doc. 10 at 5.). The scheduling order filed by the court on January 26, 2006 indicates that "this is a jury trial." (Doc. 14.)

III. ANALYSIS

A. Home Depot's Partial Motion for Judgment on the Pleadings Regarding the Breach of Contract Claim.

1. **Standard of Review.**

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. Pro. 12(c). For purposes of such a motion, "the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990). Judgment on the pleadings is appropriate "when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Id.*

2. **Home Depot's Argument that the Contract is Unenforceable for Failure to Satisfy the Statute of Frauds.**

Home Depot moves for judgment on Plaintiff's contract cause of action on the ground that the alleged contract between Plaintiff and Rule was not reduced to writing and is therefore unenforceable. Home Depot correctly points out that California

1 Business & Professions Code section 7159 requires covered home
2 improvement projects to be in writing. However, Defendant
3 operates under the mistaken impression that this provision
4 incorporates home improvement contracts into the statute of
5 frauds.

6 In pertinent part, section 7159 provides:

7 (a)(1) This section identifies the projects for which a
8 home improvement contract is required, outlines the
9 contract requirements and lists the items that shall be
included in the contract, or may be provided as an
attachment.

10 (3) Failure by the licensee, his or her agent or
11 salesperson, or by a person subject to be licensed
12 under this chapter, to provide the specified
information, notices, and disclosures in the contract,
or to otherwise fail to comply with any provision of
this section, is cause for discipline.

13 (b) For purposes of this section, "home improvement
14 contract" means an agreement, whether oral or written,
15 or contained in one or more documents, between a
contractor and an owner or between a contractor and a
16 tenant, regardless of the number of residence or
dwelling units contained in the building in which the
17 tenant resides, if the work is to be performed in, to,
or upon the residence or dwelling unit of the tenant,
18 for the performance of a home improvement, as defined
in Section 7151, and includes all labor, services, and
19 materials to be furnished and performed thereunder, if
the aggregate contract price specified in one or more
20 improvement contracts, including all labor, services,
and materials to be furnished by the contractor,
exceeds five hundred dollars (\$500)...

21 (d) A home improvement contract and any changes to the
22 contract, shall be in writing and signed by the parties
23 to the contract prior to the commencement of any work
covered by the contract or applicable change order....

24 Home Depot insists that this provision is the equivalent of
25 applying the statute of frauds to home improvement contracts. In
26 support of this contention, defendant first cites California
27 Civil Code section 1624, which codifies the general statute of
28 frauds and provides that oral contracts subject to it are

1 invalid. This provision, however, fails to demonstrate that home
2 improvement contracts covered by section 7159 are subject to the
3 statute of frauds. Defendant cites no cases in support of this
4 latter proposition, relying instead on a single secondary source:
5 *Ann Taylor Schwing*, 3 California Affirmative Defenses § 53.23.
6 Home Depot represents that this source "recogniz[es] Business and
7 Professions Code § 7159 as an additional statute of frauds."
8 But, the Affirmative Defenses manual does not go this far. The
9 one-page entry at § 53.23 simply states that "[t]here are a wide
10 variety of [] California statutes requiring a written contract if
11 the parties are to make a contract with respect to the particular
12 subject matter addressed in the statute...." The entry lists
13 more than twenty such California statutes, including section
14 7159, and concludes by stating that "[d]epending on the
15 circumstances of the parties and their relationship, federal law
16 or the law of another state may impose a statute of frauds."⁵
17 Home Depot's reliance on this source in support of its assertion
18 that the statute of frauds applies to the contract in this case
19 indicates carelessness at best and arguably demonstrates
20 inattention to its Rule 11 responsibilities.

21 Contrary to Home Depot's assertions, contracts for home
22 improvement are not governed by the statute of frauds. See Cal.
23 Civ. Code § 1624 (specifically enumerating types of contracts
24 that are subject to the statute of frauds, generally including
25

26 ⁵ Plaintiff also cites to 1 Witkin, Summary of California
27 Law, Contracts § 344 et seq. (10th ed. 2005). But this source
28 discusses only the statute of frauds as codified, and does not
mention Business and Professions Code section 7159.

1 contracts for the sale or transfer of goods or real property or
2 services contracts that cannot be performed within one year). Of
3 the California cases that have construed Business and Professions
4 Code section 7159, none have treated this provision as an
5 equivalent to the statute of frauds.

6 Nevertheless, section 7159 is a valid regulatory
7 requirement. As a general rule, a contract made in violation of
8 law is voidable. See *Asdourian v. Araj*, 38 Cal. 3d 276, 291
9 (1985). However, there are many exceptions to this general rule,
10 including a broad exception that allows oral contracts covered by
11 section 7159 to be enforced.⁶ See *Id.* For example, in
12 *Asdourian*, the California Supreme Court considered whether oral
13 home improvement contracts between a contractor and an
14 experienced real estate developer should be enforced
15 notwithstanding section 7159's writing requirement. 38 Cal. 3d
16 at 293. The contractor sought enforcement, while the real estate
17 developer, who had not paid for the home improvements, sought a
18 ruling that the contract was void. Acknowledging the general
19 rule that "a contract made in violation of a regulatory statute
20 is void," the *Asdourian* court noted that "the rule is not an
21 inflexible one to be applied in its fullest rigor under any and
22 all circumstances." The court placed particular emphasis on the
23 exception that allows illegal contracts to be enforced in order
24 to "avoid unjust enrichment to a defendant and a
25 disproportionately harsh penalty upon the plaintiff." *Id.* In

26
27 ⁶ In this way, the general rule that a contract is void
28 for violating public policy is very different from the statute of
frauds, which is strictly applied.

1 addition, the court reasoned that:

2 [T]he extent of enforceability and the kind of remedy
3 granted depend upon a variety of factors, including the
4 policy of the transgressed law, the kind of illegality
5 and the particular facts.

6 *Id.* The *Asdourian* court found the contract at issue to be
7 enforceable, reasoning that "the policy of section 7159 is to
8 encourage written contracts for home improvements in order to
9 protect unsophisticated consumers." Because the party seeking to
10 have the contract voided was a sophisticated developer (i.e., not
11 a member of the group "primarily in need of the statute's
12 protection"), he did not deserve the benefit of having the
13 contract voided. Section 7159 is a consumer protection
14 regulation designed to protect unsophisticated consumers seeking
15 home improvements. The statutory scheme is not designed to
16 enable home importers who are or act as contractors to avoid
17 responsibility.

18 Similarly, the party seeking to have the contract voided
19 here (Home Depot) is not a member of the group "primarily in need
20 of the statute's protection." Rather, Mr. Shoals, who does falls
21 within the ambit of the statute's protective reach, seeks to
22 enforce the contract.

23 Defendant's efforts to distinguish *Asdourian* as an
24 extraordinary case are unpersuasive. For example, Defendant
25 argues that "there can be no claim of unjust enrichment vis-a-vis
26 Home Depot" because "Shoals gave \$10,000 to Rule -- not Home
27 Depot..." But Defendant misses the thrust of the court's
28 reasoning in *Asdourian*. The California Supreme Court
acknowledged that the party seeking enforcement was a contractor

1 and therefore "should have been aware that the contracts were
2 required to be in writing." *Id.* at 294. Nevertheless, under the
3 circumstances presented, "enforcing the oral agreements [did] not
4 defeat the policy of the statute." *Id.* Critically, "the penalty
5 which would result from the denial of relief would be
6 disproportionately harsh in relation to the gravity of the
7 violations." *Id.*

8 Here, the case for enforcement is even stronger than in
9 *Asdourian*. Here, the party seeking enforcement, Mr. Shoals, is
10 an inexperienced consumer with no reason to be aware that a
11 regulation requires home improvement to be in writing. As
12 discussed, Plaintiff is exactly the type of individual the
13 statute seeks to protect. It was Home Depot's responsibility, as
14 a purported home improvement contractor, through its alleged
15 agent, Rule, who should have provided a written contract. In
16 this case, "enforcing the oral agreements [would] not defeat the
17 policy of the statute...and the penalty which would result from
18 the denial of relief would be disproportionately harsh in
19 relation to the gravity of the violations." *Id.*

20
21 In sum, the strict writing requirement contained within the
22 statute of frauds does not apply here. Although California
23 Business and Professions Code section 7159 does require that home
24 improvement contracts be in writing, the alleged contract at
25 issue here should be enforceable if the trier of fact believes a
26 contract was made.

1 **3. Home Depot's Argument that the Equal Dignities**
2 **Rule Bars Enforcement.**

3 Plaintiff's contract claim appears implicates Home Depot on
4 the ground that its agent, Rule, a manager, had "ostensible
5 authority" to enter into an agreement on behalf of Home Depot.
6 Defendant argues that the so-called "equal dignities rule" bars a
7 claim based upon ostensible authority from proceeding.

8 Ostensible authority is "such [authority] as a principal,
9 intentionally or by want of ordinary care, [that the principal]
10 causes or allows a third person to believe the agent possesses."
11 Cal. Civ. Code § 2317. Ostensible authority can arise as a
12 result of the principal's conduct which causes the third party to
13 reasonably believe that the agent possesses the authority to act
14 on the principal's behalf. *Tomerlin v. Canadian Indem. Co.*, 61
15 Cal. 2d 638 (1964). Ostensible authority can be implied from the
16 facts and circumstances of the case. *Id.*

17 Plaintiff points to a number of facts supporting his
18 assertion that Rule had ostensible authority to bind Home Depot.
19 First, Plaintiff heard a television advertisement that Home Depot
20 performed home improvement projects. When Plaintiff called Home
21 Depot, a Home Depot employee referred him to Mr. Rule in the
22 "Pros Department." Mr. Rule was at that time employed by Home
23 Depot. Rule met with Plaintiff at Plaintiff's home and
24 introduced himself as the "Pros Department manager" at Home
25 Depot. Rule utilized a Home Depot CAD program to draft plans for
26 the room addition. Rule also opened up a Home Depot credit card
27 in Plaintiff's name, and later had Plaintiff's credit limit
28 increased on that card. Home Depot authorized third parties to

1 make purchases on the account which were then delivered by Home
2 Depot. Finally, Plaintiff alleges that Home Depot was aware that
3 Rule had engaged in similar conduct in the past, but had done
4 nothing to stop him.

5 Defendant responds that, even if Plaintiff can establish
6 ostensible authority, enforcement of the contract against Home
7 Depot is nevertheless barred by the equal dignities rule. This
8 is nonsense. The equal dignities rule has been codified at
9 California Civil Code section 2309:

10 An oral authorization is sufficient for any purpose,
11 except that an authority to enter into a contract
12 required by law to be in writing can only be given in
13 writing.

14 The equal dignities rule is essentially a corollary to the
15 statute of frauds. Where a contract would be void unless reduced
16 to writing (e.g., those contracts subject to the statute of
17 fraud), authority to enter into such a contract must also be in
18 writing. Defendant points to cases applying the equal dignities
19 rule to contracts that are subject to the statute of frauds. For
20 example, in *McGirr v. Gulf Oil Corp*, 41 Cal. App. 3d 246, 252
21 (1974), plaintiff sued Gulf Oil and one of its employees for
22 breach of an oral contract to lease a service station for five
23 years. This type of lease is a contract subject to the statute
24 of frauds. Cal. Civ. Code § 1624 (applying the statute of
25 frauds' writing requirement to "an agreement that by its terms is
26 not to be performed within a year from the making thereof.").
27 Employing the equal dignities rule, the *McGirr* court reasoned
28 that, for Gulf Oil to be liable under the contract, there must be
evidence that the employee had written authority to enter into

1 the lease on behalf of Gulf Oil.

2 As discussed above, the "statute of frauds," codified at
3 California Civil Code section 1624, does not apply to the
4 contract in this case. Although section 7159 technically
5 requires home improvement contracts to be in writing, Defendant
6 offers no authority applying the equal dignities rule outside the
7 confines of the statute of frauds. Moreover, even if the equal
8 dignities rule is applicable to contracts covered by section
9 7159, it follows logically that the equal dignities rule is
10 subject to the same exceptions applicable to section 7159.

11
12 **4. Plaintiff's Estoppel Arguments.**

13 Plaintiff argues that even if the statute of frauds and/or
14 the equal dignities rule do apply to the contract in question,
15 Home Depot is estopped from asserting either defense because of
16 Rule's conduct. Specifically, Plaintiff alleges that he inquired
17 of Rule whether there would be a contract for the project. Rule
18 responded that the computer assisted design plan for the addition
19 was the contract. This allegation, if true, could justify
20 Plaintiff's reliance that the computer design plan was the
21 "contract."

22 Home Depot relies again on the equal dignities rule as a
23 defense to this estoppel argument. Under the equal dignities
24 rule, an agent cannot usually estop his principal by conduct
25 alone. See *Monte Carlo Motors v. Volkswagenwerk*, 177 Cal. App.
26 2d 107, 112 (1960). In *Monte Carlo*, defendant's agent had been
27 entrusted with several copies of a fill-in-the blanks form
28 contract subject to the statute of frauds. These copies were

1 signed by the principal and the agent was authorized to fill in
2 blanks to finalize contracts with two specific Volkswagen
3 distributors. The agent, however, did not have authorization,
4 written or otherwise, to enter into a contract with the
5 particular Volkswagen dealership owned by plaintiff. Apparently,
6 the officers of the plaintiff in this case "had knowledge that
7 the principal had not filled in the blanks before signing the
8 document." *Id.* at 111. The *Monte Carlo* court applied the equal
9 dignities rule to bar enforcement of the contract:

10 Our cases hold that the authority of an agent to fill
11 such blanks must be in writing where the document
12 itself is required to be in writing by the statute of
13 frauds.... The rule logically applies equally to all
14 instruments covered by the statute of frauds in view of
15 the fact that the agent's authority to execute every
16 such instrument is equally required to be in writing.
17 Civ. Code § 2309. It follows that where the third party
18 is on notice that there are blanks in such an
19 instrument which the agent can only fill in if his
20 authority is in writing the mere possession of such
21 incompleted document by the agent could not estop the
22 principal.

23 *Id.* at 111-12 (internal citations omitted).

24 Critically, however, the *Monte Carlo* court suggested that an
25 exception to the equal dignities rule might apply "where the
26 agent fills in the blanks and delivers the completed instrument
27 to the other party without his knowledge that the blanks were not
28 filled when the principal executed it...." *Id.* (emphasis added).
In such a case, the principal might be estopped from asserting
the equal dignities rule as a defense. *Id.* Therefore, the
outcome turns on the subjective understanding of the party
raising the estoppel argument.

 Here, plaintiff had every reason to believe that he was
contracting with Home Depot. Neither Home Depot, through its

1 agent, nor Rule himself disclosed that Rule might need to have
2 written authorization from Home Depot to enter into a home
3 improvement contract on Home Depot's behalf. Plaintiff had no
4 independent knowledge of any such requirement. Under the
5 circumstances, Rule's representation to a blind man that the
6 computer assisted design drawings were the contract, if found
7 true by a trier of fact, is enough to estop Home Depot from
8 asserting the statute of frauds and/or the equal dignities rule
9 as a defense to enforcement of the alleged contract.

10
11 Defendant's motion for partial judgment on the pleadings is
12 **DENIED.**

13
14 **5. Attorney's Fees.**

15 Home Depot moves to strike Shoal's prayer for attorney's
16 fees. In California, a prevailing party is not entitled to
17 attorney's fees unless specifically provided for by contract or
18 by statute. See Cal. Code Civ. Pro § 1021. Plaintiff does not
19 make any arguments in opposition to this motion, nor does he
20 point to any statute or contractual provision entitling him to
21 attorney's fees. Defendant's motion to strike Plaintiff's prayer
22 for attorney's fees is **GRANTED.**

23
24 **B. Motion for Jury Trial.**

25 When a case is removed from state court, the non-removing
26 party must make a demand for a jury trial within ten days of
27
28

1 service of the notice of removal. Fed. R. Civ. Pro. 81.⁷

2 Here, plaintiff failed to formally move for a jury trial
3 within the ten day window. On October 14, 2005, during the
4 required Rule 26(f) conference, counsel for plaintiff informed
5 counsel for defendant that Plaintiff desired a jury trial.
6 Defendant asserted that a jury trial was not available because
7 Plaintiff had not timely demanded one. These positions are
8 reflected in the joint scheduling report filed on December 1,
9 2005, which provides:

10 Shoals contends that he is entitled to a jury. Home
11 Depot contends that Shoals is not entitled to a jury
because Shoals did not make a timely demand for one.
12 (Doc. 10 at 5.). The scheduling order filed by the court on
13 January 26, 2006 inadvertently indicated that "this is a jury
14 trial." (Doc. 14.) No party moved to correct the scheduling
15 order.

16 A district court "in its discretion, may order a jury trial
17 on a motion by a party who has not filed a timely demand for
18 one." *Pac. Fisheries Corp. v. HIH Cas. & General Ins., Ltd.*, 239
19 F.3d 1000, 1002 (9th Cir. 2001) (citing Fed. R. Civ. Pro. 39(b)).
20 However, this discretion is narrowly construed and "does not
21 permit a court to grant relief when the failure to make a timely
22

23 ⁷ Alternatively, where a party "prior to removal, has
24 made an express demand for trial by jury in accordance with state
25 law, [that party] need not make a demand after removal."
26 California Code of Civil Procedure section 631 requires a party
to request a jury trial at the trial setting or case management
27 conference. Here, however, the case management conference was
set for December 23, 2005. Because the case was removed on
28 September 16, 2005, the state court case management conference
was never held.

1 demand results from an oversight or inadvertence." *Id.*
2 Accordingly, "an untimely request for a jury trial must be denied
3 unless some cause beyond mere inadvertence is shown." Numerous
4 cases are in accord. *See, e.g., Zivkovic v. Southern Cal. Edison*
5 *Co.*, 302 F.3d 1080, 1086-87 (9th Cir. 2002); *Russ v. Stand. Ins.*
6 *Co.*, 120 F.3d 988 (9th Cir. 1997); *Kletzelman v. Capistrano*
7 *Unified Sch. Dist.*, 91 F.3d 68,71 (9th Cir. 1995).

8 Plaintiff attempts to distinguish the *Pacific Fisheries* line
9 of cases on their facts, arguing that in all of these cases, the
10 party seeking a jury trial did not request a jury until many
11 months after the applicable deadline. Here, Plaintiff apparently
12 informed Defendant of his desire for a Jury trial at their Rule
13 26(f) conference on October 14, 2005, within one month receiving
14 notice of removal on September 19, 2005. But, Plaintiff, points
15 to no cases that distinguish *Pacific Fisheries* on such grounds.

16 Plaintiff points to *Mondor v. United States District Court*
17 *for the Central District of California*, 910 F.2d 585, 587 (9th
18 Cir. 1990), in which the Ninth Circuit considered whether a jury
19 demand contained within Plaintiff's state court complaint
20 satisfied the requirements of Rule 81 upon removal to federal
21 court. The Ninth Circuit reasoned that this pre-removal jury
22 demand did satisfy Rule 81, even though it would not have
23 satisfied state requirements, because that demand is incorporated
24 into the federal record upon removal.

25 Here, Shoals did not to make any pre-removal jury demand in
26 state court. Plaintiff points to no Ninth Circuit cases
27 departing from the strict rule articulated in *Pacific Fisheries*
28 under such circumstances. *Pacific Fisheries* is the law of this

1 circuit, and is binding upon the district court. See *Barapind v.*
2 *Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005) (articulation of
3 rule by circuit court is law of the circuit, even if not
4 technically necessary to disposition of case). Plaintiff has
5 presented no evidence that his failure to demand a jury trial was
6 caused by anything other than inadvertence.

7 Plaintiff also suggested at oral argument that Home Depot
8 may have waived its objection to plaintiff's untimely demand for
9 a jury trial. Plaintiff was given an opportunity to supplement
10 the record on this issue. On March 8, 2006, Plaintiff submitted
11 the declaration of Gregory L. Myers, a shareholder in the firm
12 retained to represent Mr. Shoals. Mr. Myers conceded that Home
13 Depot did not waive its objection and requested. (Doc. 26.)
14 Accordingly, Plaintiff's waiver argument fails.

15 Plaintiff's demand for a jury trial must be **DENIED** of right.

16
17 **IV. CONCLUSION**

18 For the reasons set forth above:

- 19 (1) Defendant's motion for partial judgment on the pleadings
20 regarding the breach of contract claim is **DENIED**;
21 (2) Defendant's motion to strike Plaintiff's prayer for
22 attorney's fees is **GRANTED**; and
23 (3) Plaintiff's motion for a jury trial is **DENIED**.

24 **SO ORDERED.**

25 **March 16, 2006.**

26
27
28

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE